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IN THE

Supreme Court of the United States

October Term, 1958.

No. 531.

HARRY J. ALKER, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Petitioner's Reply Memorandum.

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PETITIONER'S REPLY MEMORANDUM.

The present case shows, almost as clearly as if it were an experiment set up in a laboratory under controlled conditions, just what happens when accepted standards of criminal procedure are whittled away from case to case under judicial sanction, so that while lip-service is still being paid to doctrine, exceptions thereto are formulated and then gradually extended, until in due course the principle itself in fact disappears.

The seriousness of the inroads made into hitherto settled rules for the conduct of criminal trials is emphasized—although only reflexly—by the Government's concentration on the alleged harmlessness of the manifest errors below.

I.

With respect to the first point presented by the petition—the Government's cross-examination of one of petitioner's character witnesses—the court below said (Pet. 20a-21a):

> "The interrogation under consideration exceeded the bounds of propriety. One question not specifically assigned as error but covered by counsel's trial objection was in hypothetical form manifestly violative of the decisional law. • • •
>
> "To permit inquiries of this nature would undermine the cautioning instruction sanctioned by Michelson [*Michelson v. United States*, 335 U. S. 469] and adopted by the trial judge in the immediate prosecution to the effect that the triers are not to assume the occurrence of the disreputed act. In addition, serious doubt is raised as to the currency and similarity of character defects with respect to the disbarment and treasury card incidents."

It is difficult, if not impossible, to find the foregoing language or even its substance, reflected anywhere in the Government's Brief in Opposition, except insofar as there is a vague reference in a footnote (Br. Op. 15, note 6) where it is said "The court below held that the hypothetical question was improper but was not reversible error • • •." The rest of the Government's argument (Br. Op. 14-17) alternates between urging that the error was not reversible and urging that the rulings complained of were not error.

The decisions relied upon in the petition (Pet. 16-17: *Roberson v. United States*, 237 F. 2d 536, 538-542 (C. A. 5), and *Gaunt v. United States*, 184 F. 2d 284, 292-293 (C. A. 1), certiorari denied, 340 U. S. 917) reflect an attitude different from that of the court below as to the seriousness of cross-examination in violation of the *Michelson* rule. Those cases are referred to, but not discussed, in another Government

footnote (Br. Op. 16-17, note 7); we remark in passing the tendency of the Government brief to relegate every question of difficulty to footnotes.

In *Roberson*, the improper cross-examination was held to require reversal; in *Gaunt*, the question was not answered and was immediately followed by a cautionary instruction, which led the court of appeals to say (184 F. 2d at 293) that "we cannot say that the corrective measure was so hopelessly inadequate as to warrant the conclusion that the trial court abused its discretion in refusing to grant a new trial on that score"—even though the court of appeals stressed the prejudicial nature of the question. Here, however, the questions were fully answered, the cautionary instruction did not come until much later, and the court below, holding that error was committed, went on to conclude, after a lengthy discussion (Pet. 18a-24a; 260 F. 2d at 149-152), that the error was not prejudicial.

We do not contend that the wholly different attitude of the Fifth Circuit that is set forth in *Roberson* rises, when placed against the opinion of the Third Circuit in this case, to the level of a square conflict between circuits. We do urge that the two cases reflect such a markedly different scale of evaluation, in a constantly recurring and hence important context, as to call for review by this Court with a view to reaffirming—or, if need be, restating—the rules laid down in *Michelson v. United States*, 335 U. S. 468; because, very plainly, bench and bar should know whether *Michelson* means what it says, or whether its standards are to be regarded merely as pious homilies, to be disregarded whenever it seems convenient to do so.

II.

With respect to the second question presented—the effect of the suspension of petitioner's jury trial for two whole months—the court below said (Pet. 37a):

> "The inordinate delay between the Government's case and the accused's presentment although not spe-

> cifically urged as error has caused the court much concern. A continuance lasting two months in a criminal prosecution of a non-corporate defendant can hardly be termed commensurate with the minimal standards required for the efficient administration of justice."

Indeed, the two months' suspension of the trial caused the court below such concern that it held the case for nearly eight months between argument and decision (Pet. 1a). Yet while the court made this additional observation (Pet. 37a)—

> "Long delays in proceedings are unquestionably inimical to our system of justice and should not be countenanced save for compelling reasons. In instances where a short stay will not suffice the trial judge should (1) revoke the bail of the accused and force trial, or (2) grant a mistrial."

—it approved the interrupted trial because petitioner "precipitated the unfavorable situation" (Pet. 37a), thus in effect saddling him with a manifestly improper trial as a form of additional punishment.

We submit that the grave irregularity here involved cannot be disposed of thus summarily. If it is proper to suspend a jury trial for two months, at what point does such suspension finally become improper? At six months? Or a year? Or can a criminal trial properly be suspended for two years, and then resumed where the earlier proceedings left off?

We are not indulging in hyperbole or conjuring up imaginary horribles. Only recently, a court of appeals, after first reversing a conviction, on a rehearing sought by the Government remanded the case to the trier of facts for a reassessment of the evidence as to criminal intent; and such a reassessment was then actually undertaken, two years after the close of the original trial! *Wilson v. United States*, 250 F. 2d 312 (C. A. 9) (as amended on Govern-

ment's petition for rehearing); *Wilson v. United States*, 254 F. 2d 391 (C. A. 9) (appellant's petition for rehearing denied on the authority of *Communist Party v. Control Board*, 351 U. S. 115); now pending on second appeal, C. A. 9, No. 16184.

We ask, how can the trier or triers of fact possibly retain in their minds any accurate impression of testimony after even a two-months' interval. The answer—the obvious answer—is that they cannot. What this Court said in a somewhat different context (*Shepard v. United States*, 290 U. S. 96, 104) is fully pertinent here:

> "Discrimination so subtle is a feat beyond the compass of ordinary minds. * * * It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. Where the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."

We submit that a two-months' intermission in the middle of a criminal trial utterly destroys the essential prerequisites of a fair and proper hearing.

III.

"The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law." Thus spoke the Court in *McNabb v. United States*, 318 U. S. 332, 347. Those sentences have often been repeated, perhaps to the verge of rendering them hackneyed. But we think it is just as true today as in 1913 that "we need education in the obvious more than investigation of the obscure" (Holmes, *Speeches*, 99), and so we do not apologize for recurring to the fundamental truth articulated in *McNabb*.

The present case is, as we have said, virtually a laboratory example of what happens when basic and all-permeating irregularities are put to one side on the view that the defendant is, on an after-reading of a cold record, deserving of punishment, and so not entitled even to minimal observance of procedural regularity.

Accordingly, for these additional reasons, we believe that the present case calls for review by this Court.

Respectfully submitted,

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